UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

JIMMY MIKHEL, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:03 CV 380
	)	
RODNEY LANGEL and	)	
LANGEL'S PIZZA,	)	
	)	
Defendants	)	

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendants' Motion for Summary Judgment. Plaintiff Jimmy Mikhel was fired from Langel's Pizza by the owner, Rodney Langel. Plaintiff alleges that he was terminated because of his race and seeks redress under Title VII of the Civil Rights Act of 1964. Defendants Rodney Langel and Langel's Pizza moved for summary judgment on June 1, 2004. On July 22, 2004, the Court sent a Notice and Order to alert *pro se* Plaintiff Jimmy Mikhel of the manner in which he was required to respond to Defendants' Motion. Mikhel filed a "Response to Motion" on July 28, 2004. Because Mikhel cannot make out a *prima facie* case of discrimination, and because the Defendants have come forth with a legitimate, non-discriminatory reason for his firing, Defendants' Motion for Summary Judgment is granted.

I. BACKGROUND

Mikhel began work at Langel's Pizza in January 2002. On his application for employment, he believes that he put that he was white, if he put anything. Curiously, Mikhel bases his claim on the fact that he is a white Caucasian male even though in his deposition he

stated that he looks white, but he is half Hungarian and half Indian. (Plaintiff's Dep. at 43 and 77).

Mikhel was a dishwasher at Langel's Pizza, and his duties consisted of cleaning the dishes, the bathrooms, and other parts of the restaurant. Langel and three managers supervised Mikhel during the course of his employment. There were two general managers, Nicolette Langel, Langel's daughter, and Tarama Hill, who were both white Caucasian females. The kitchen manager was Gloria Salas, a Hispanic female. The owner, Langel, a white Caucasian male, was the only person with hiring and firing authority. The total staff at Langel's Pizza consisted of 36 employees, of which about eighty percent were white. In addition, Mikhel estimated that there were less than five Hispanic employees.

Mikhel was involved in several untoward incidents while working for Langel's Pizza. During his first stint of employment, on May 7, 2002, he received written complaints on comment cards from two fellow employees. The manager on duty, Tamara Hill, also wrote up the incident. She wrote that Mikhel harassed two of the phone girls. According to the incident report, Mikhel referred to one of them as "an asshole" and the other as a "little bitch." (Defendant's Exhibit C). Only a few weeks after this incident, on May 22, 2002, the owner, Langel, filed another incident report. This report explains that a sister of one of the employees claimed that Mikhel approached her to solicit her to go to a motel and have sex with him. Mikhel confirmed the incident in his deposition. (Plaintiff's Dep. at 27). Nonetheless, he continued in the employ of Langel's Pizza until November of 2002 when he was fired for his insubordination to Tamara Hill, a general manager.

Langel's Pizza rehired Mikhel in March of 2003. The negative incidents that occurred

during his first stint of employment continued. On April 16, Nicolette Langel reported that Mikhel had argued with a waitress the day before, telling her that her handicapped foster son was "retarded," "good for nothing," and that the son needs to "stay out of his way." (Defendant's Exhibit E). Further, on May 12, Nicolette reported that when Mikhel came into work and saw his reduced hours, he said, "that Mexican is tryin' to get rid of me," apparently referring to the kitchen manager, Gloria Salas. (Defendant's Exhibit F). Rodney Langel, the owner of Langel's Pizza, terminated Mikhel from his job on July 10, 2003, because of his past behavior problems and especially because of disruptive and belligerent behavior on that day.

In his Complaint and Response to Motion, Mikhel alleges discriminatory conduct on the part of Langel's Pizza and its employees. He states that during his employment, he was given the impression that the owner and the kitchen manager did not want him working there. He also claims that Gloria Salas made unnecessary comments and antagonistic statements to Langel about him. He alleges that he was verbally harassed by the kitchen manager and accused of making unnecessary comments. He further maintains that he knew that Rodney Langel and his daughter, Nicolette, disliked him and did not want him there and that Nicolette went to her father at various occasions because she wanted him to be fired. Finally, Mikhel explains that he got the impression that Salas was prejudiced. Mikhel alleges these opinions and inferences without specific factual foundation. In fact, Mikhel makes other statements in his deposition that are contrary to these allegations.

For example, Mikhel claims that the managers did not like him and harassed him because of his race, but he never heard any comments made to him about his race by the management or anyone else with whom he worked. He never heard Gloria Salas make any derogatory comments

about the fact that he was Caucasian or say that the reason she disliked him or wanted to get rid of him was because he was white.

As for the relationship between the decision-maker in this case, Rodney Langel, and Mikhel, the evidence indicates that Mikhel's assertions that Langel "really didn't like [him] to begin with" are not true. First off, Langel hired Mikhel not once, but twice. Further, Langel appears to have gone to bat for Mikhel on several occasions. There were times when three or four of the managers wanted Langel to fire Mikhel and he ignored their advice. (Plaintiff's Dep. at 51-52, 86-87). Langel even loaned Mikhel money for automobile supplies and clothing (Plaintiff's Dep. at 41). And he once allowed Mikhel to come back to work after he was incarcerated for a few days. (Plaintiff's Dep. at 42). As for any racial element to this relationship, Mikhel admits that he never heard Langel or anyone else make any comments about his being white or Indian. (Plaintiff's Dep. at 52 and 70-71).

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment carries the initial burden of demonstrating an absence of evidence to support the position of the non-moving party. *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 443 (7th Cir. 1994). The non-moving party must then set forth specific facts showing there is a genuine issue of material fact and that the moving party is not entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

252 (1986). A genuine dispute about a material fact exists only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

In making this determination, the Court must draw every reasonable inference from the record in the light most favorable to the non-moving party. *Haefling v. United Parcel Serv., Inc.,* 169 F.3d 494, 497 (7th Cir. 1999). The non-moving party must support its contentions with admissible evidence and may not rest upon mere allegations in the pleadings or conclusory statements in affidavits. *Celotex*, 477 U.S. at 324. The plain language of Rule 56(c) mandates the entry of summary judgment against a party who fails to establish the existence of an element essential to its case and on which that party will bear the burden of proof at trial. The production of only a scintilla of evidence will not suffice to oppose a motion for summary judgment. *Anderson*, 477 U.S. at 252. Employment discrimination cases, while often turning on factual questions, are nonetheless amenable to summary judgment when there is no genuine dispute of material fact or there is insufficient evidence to demonstrate the presence of the alleged motive to discriminate. *Cliff v. Board of School Comm'r*, 42 F.3d 403, 409 (7th Cir. 1994).

B. Local Rule 56.1

Local Rule 56.1 sets forth specific requirements for both the party moving for summary judgment as well as for the non-moving party. It directs the moving party to file a "Statement of Material Facts" as to which "the moving party contends there is no genuine issue." N.D. Ind. L.R. 56.1(a). The party opposing the summary judgment motion must respond to each of the purported undisputed facts with a "Statement of Genuine Issues" setting forth "all material facts as to which it is contended there exists a genuine issue necessary to be litigated." *Id.* The Local

Rule specifically states that "the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted in the 'Statement of Genuine Issues' filed in opposition to the motion." N.D. Ind. L.R. 56.1(b); *see also Thiele v. Norfolk & Western Ry. Co.*, 873 F. Supp. 1240, 1243 (N.D. Ind. 1994). Although Mikhel did file a Response to Motion for Summary Judgment, it was only one page long and very short on facts. In addition, he failed to submit a 'Statement of Genuine Issues.' Given that Plaintiff has not disputed any of the facts set forth in the Defendants' Statement of Material Facts, the Defendants' allegations in its Rule 56.1 Statement of Material Facts are deemed admitted unless they are unsupported by the evidence or contradict each other. *See Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir. 2003) ("[w]e have consistently held that a failure to respond by the nonmovant as mandated by the local rules results in an admission"); *Michas v. Health Cost Controls of Ill.*, *Inc.*, 209 F.3d 687, 689 (7th Cir. 2000) (same).

Nevertheless, even where an opposing party completely fails to respond to a summary judgment motion, Rule 56(e) permits judgment for the moving party only "*if appropriate* – that is, if the motion demonstrates that there is no genuine issue of material fact *and* that the movant is entitled to judgment as a matter of law." *Johnson v. Gudmundsson*, 35 F.3d 1104, 1112 (7th Cir. 1994) (quoting *Tobey v. Extel/JWP, Inc.*, 985 F.2d 330, 332 (7th Cir. 1993) (emphasis supplied)). Thus, even where all of the material facts are undisputed, the court still must ascertain that judgment is proper "as a matter of governing law." *Id.* (citations omitted). For this reason, we will analyze Mikhel's claims of discrimination to determine whether judgment in favor of the Defendants is proper.

C. Mikhel's Title VII Discrimination Claim

Mikhel claims that his termination violated Title VII because Langel's Pizza and Rodney Langel treated him unfairly due to his race, color and national origin. Title VII makes it unlawful for an employer "to fail or refuse to hire or discharge any individual, or to otherwise discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin. . ." 42 U.S.C. § 200e-2(a)(1). In order to succeed on a Title VII claim, a plaintiff must prove that he was intentionally discriminated against in an employment action. *Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 982 (7th Cir. 1999). Such intentional discrimination can be proven by either the direct or the indirect method. *Id*.

1. Direct Method

Under the direct method, there are two types of permissible evidence. First, there is direct evidence, or evidence that, if believed by the trier of fact, would prove the fact in question "without reliance on inference or presumption." *Rogers v. City of Chicago*, 320 F.3d 748, 753 (7th Cir. 2003) (internal quotation omitted). Direct evidence "essentially requires an admission by the decision-maker that his actions were based upon the prohibited animus." *Id.* (internal quotation omitted). For obvious reasons, courts rarely encounter direct evidence. *Id.* The second type of evidence permitted under the direct method is circumstantial evidence, or evidence that allows a jury to infer intentional discrimination by the decisionmaker. *Id.* Mikhel has come forward with neither direct nor circumstantial evidence from which a jury could find intentional discrimination either directly or through inference. Thus, he must proceed through the indirect, burden shifting method.

2. Indirect Method

The indirect, burden-shifting method was outlined by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 801-803 (1973). Under *McDonnell Douglas*, a plaintiff can establish a *prima facie* case by showing the following: (1) he is a member of a protected class, (2) he performed his job satisfactorily, (3) he suffered an adverse employment action, and (4) he was treated less favorably than one or more similarly situated employees outside of his protected class. *See Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 547 (7th Cir. 2002); *Stockett v. Muncie Ind. Transit Sys.*, 221 F.3d 997, 1001 (7th Cir. 2000). If a plaintiff establishes a *prima facie* case, then the burden shifts to the employer to present evidence of a legitimate, non-discriminatory reason for the adverse employment action. *Krchnavy v. Limagrain Genetics Corp.*, 294 F.3d 871, 876 (7th Cir. 2002). If such a reason is supplied, then the employee must show that the reason is merely pretext for discrimination. *Id.*

Over time, the Seventh Circuit has modified the *McDonnell Douglas* test to correspond to a variety of situations. For example, the first prong of the *McDonnell Douglas* test does not apply to members of majority groups. Thus, in cases of "reverse discrimination," a plaintiff must show "background circumstances" that demonstrate that an employer has "reason or inclination to discriminate invidiously against whites" or evidence that "there is something 'fishy' about the facts of the case at hand." *Mills v. Health Care Serv., Corp*., 171 F.3d 450, 454 (7th Cir. 1999) (quoting *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993)).

Background circumstances that illustrate that an employer discriminated against employees in the majority may include: (1) evidence indicating the employer has a reason or inclination to discriminate against whites, (2) evidence of schemes to fix performance ratings, (3) evidence that the hiring system seemed rigged because it departed from the usual procedures

in an unprecedented fashion, or (4) evidence that the plaintiff was passed over despite superior qualifications. *Id*. at 455. Another example might be evidence that the plaintiff was the only Caucasian employee in a department where nearly all of the decision makers were racial minorities. *Id.* (citation omitted).

The Defendants contend that Mikhel cannot satisfy the first element of the *prima facie* test because he has not supplied evidence of background circumstances that would support an inference that Langel's Pizza discriminates against white men. Indeed, Mikhel's only evidence appears to consist of an impression that a manager, Gloria Salas, a Hispanic female, was prejudiced. However, although he stated that he had the impression that she was prejudiced, he also stated that she had never made a derogatory comment about the fact the he was Caucasian, that she also recommended the firing of a Hispanic man, and that she did not get along with many customers, regardless of their race. Furthermore, it is undisputed that Salas did not have any hiring or firing power. Only Rodney Langel had the power to terminate an employee and, as admitted by Mikhel, although four managers had previously recommended Mikhel's termination, Langel did not terminate him until July 10, 2003. Moreover, Langel's Pizza has around 36 employees and, according to Mikhel, eighty percent of them are Caucasian. Additionally, Rodney Langel is Caucasian, the person who replaced Mikhel was a Caucasian male, and the other two mangers were Caucasian females. These facts do not support an inference that Langel's Pizza discriminates against Caucasians.

This does not entirely dispose of the first prong of the test, however. Although Mikhel seems to be prosecuting his case under a reverse discrimination theory, it appears from his deposition that he is not actually Caucasian, as he is half Indian and half Hungarian. (Plaintiff's

Dep. 43). Thus, Mikhel fails to make his *prima facie* case with regard to the first prong of his reverse discrimination claim, but there is a material issue of fact as to whether he meets the first prong of his *prima facie* case with regard to race. In addition, on his Complaint form he checked boxes that indicate that he believed he was discriminated against on the basis of his race, color, and national origin. Thus, there is a material issue of fact as to whether or not he meets the first prong of the test with regards to color and national origin. This issue is unimportant, however, because Mikhel's claim fails on other grounds.

The Defendants argue that Mikhel cannot show that he satisfactorily performed his job duties, and there are numerous instances of inappropriate behavior and conduct on the job that back up this argument. Despite several warning and reprimands, Mikhel used vulgar and inappropriate language and harassed his co-employees. Documented examples of his inappropriate behavior include referring to a waitress's handicapped foster son as "retarded" and "good for nothing," stating that "that Mexican is trying to get rid of me" (referring to the manager Gloria Salas), missing work due to incarceration, and suffering from a paranoia attack in the bathroom because of drug use. And that is only the unsatisfactory conduct that occurred after he was rehired. During his first period of employment, he also harassed female co-workers by calling one an 'asshole' and the other a 'little bitch,' and solicited a customer to go to a motel and have sex with him. Clearly, Mikhel was not performing his job in a satisfactory manner. Since he fails to meet that prong of his *prima facie* case, there is no need to examine the others.

3. Pretext

Even if the Court were to assume that Mikhel did have sufficient evidence to establish a *prima facie* case, summary judgment would still be proper because the Defendants have

presented a legitimate, non-discriminatory reason for his termination, and Mikhel has not demonstrated that this reason was a pretext for a discriminatory animus. *See, e.g., Chiaramonte v. Fashion Bed Group, Inc., a Div. of Leggett & Platt, Inc.*, 129 F. 3d 391, 398 (7th Cir. 1997). Under the *McDonnell Douglas* test, to defeat the Defendants' Motion for Summary Judgment, Mikhel must demonstrate that the stated reason for his firing was pretext for a discriminatory animus. *Krchnavy v. Limagrain Genetics Corp.*, 294 F.3d 871, 876 (7th Cir. 2002). As this Circuit has often stated, the court does not "sit as a super personnel department to review an employer's business decisions." *Ransom v. CSC Consulting, Inc.*, 217 F.3d 467, 471 (7th Cir. 2000) (quoting *McCoy v. WGN Cont'l Broad. Co.*, 957 F.2d 368, 373 (7th Cir. 1992)). The question for courts is whether the employer's proffered reason was pretextual, meaning it was a lie and not merely a mistake. *Wolf v. Buss (America) Inc.*, 77 F.3d 914, 919 (7th Cir. 1996).

Langel terminated Mikhel because of his disruptive and insubordinate behavior toward co-employees, management and customers, especially his disruptive and belligerent behavior on July 10, 2003. There is ample evidence to support these reasons for his termination. Moreover, Mikhel has presented no evidence to suggest that Langel's non-discriminatory reason was pretext. All Mikhel has really come forward with is his conclusory allegations that he believes that some of his supervisors had a racial bias against him. Mikhel's subjective belief, without more, does not create a material issue of fact entitling him to a trial. *Mills v. First Federal Savings and Loan Assoc. of Belvedere*, 83 F.3d 833, 843 (7th Cir. 1996). Accordingly, the Defendants' Motion for Summary Judgment on Mikhel's Title VII claim is granted.

III. CONCLUSION

For the foregoing reasons, the Defendant's Motion for Summary Judgment [Docket No. 17] is **GRANTED**. The clerk shall **ENTER FINAL JUDGMENT** in favor of Langel's Pizza and Rodney Langel stating that Jimmy Mikhel is entitled to no relief. The clerk shall treat this civil action as **TERMINATED**. All further settings in this action are hereby **VACATED**.

SO ORDERED.

ENTERED: October 7, 2004

s/ Philip P. Simon
PHILIP P. SIMON, JUDGE
UNITED STATES DISTRICT COURT